Supreme Court, U.S.
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No. 98-359

In The

Supreme Court of the United States

October Term, 1998

BARNEY DOYLE, et al., and
JOSEPH CUNETTA, et al.,

Petitioners,

v.

BELLSOUTH COMMUNICATION SYSTEMS, INC., and
BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITIONERS' REPLY BRIEF

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A.

PETITIONERS' FAILURE TO CHALLENGE THE CONSTITUTIONALITY OF § 2103 OF THE COMMUTING ACT BEFORE THE COURT OF APPEALS DOES NOT PREVENT THEM FROM RAISING SUCH A CHALLENGE BEFORE THIS COURT

In their Petition for Writ of Certiorari, Petitioners have acknowledged that they did not challenge the constitutionality of § 2103 of the Employee Commuting Flexibility Act of 1996 ("the Commuting Act") before the U.S. Court of Appeals for the Sixth Circuit.

Respondents, at pp. 8-10 of their Brief in Opposition, citing *Pennsylvania Department of Corrections v. Yeskey*, ___ U.S. ___, 118 S. Ct. 1952, 1956 (1998), have argued that Petitioners' failure to challenge the constitutionality of § 2103 of the Commuting Act before the Court of Appeals bars Petitioners from mounting such a challenge in this Court.

Petitioners respectfully submit that the "exceptional circumstances" – warranting this Court's consideration of an issue not presented to the Courts of Appeals – found to exist in *Youakim v. Miller*, 425 U.S. 231 (1976), and *Carlson v. Green*, 446 U.S. 14 (1980), are present in this case because:

> (1) as of December 3, 1996 – when the District Court granted Respondents' motion for summary judgment – no reported decision had explicitly declared a federal statute unconstitutional by reason of its retroactivity;
>
> (2) Petitioners' attorneys were properly concerned that sanctions could be imposed against them by the Court of Appeals pursuant

to Rule 38, Federal Rules of Appellate Procedure, if they unsuccessfully challenged the constitutionality of § 2103 of the Commuting Act;

(3) on June 25, 1998 – eighty-three (83) days after the Court of Appeals' April 3, 1998, affirmance of the District Court's judgment – this Court issued its decision in *Eastern Enterprises v. Apfel*, ___ U.S. ___, 118 S. Ct. 2131, declaring unconstitutional the retroactive liability provision of the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"); and

(4) the denial of the Petition for Writ of Certiorari would time-bar the between 10,000 and 20,000 as yet unidentified and unnotified participants in Respondents' Motor Vehicle Usage Program and Home Dispatch Program from challenging the constitutionality of § 2103 of the Commuting Act.

B.

PETITIONERS HAVE TIMELY NOTIFIED THE SOLICITOR GENERAL OF THE UNITED STATES OF THEIR INTENTION TO CHALLENGE THE CONSTITUTIONALITY OF § 2103 OF THE COMMUTING ACT

In their Brief in Opposition, pp. 10-11, Respondents have noted that, while this case was pending before the District Court, Petitioners did not notify the U.S. Department of Justice of their challenge to the constitutionality of § 2103 of the Commuting Act. However, the statute upon which Respondents rely, 28 U.S.C. § 2403(a), obligates the *court, not the challenging party,* to provide such

notice and the Federal Rules of Civil Procedure do not address this matter.

In addition, Respondents point to Petitioners' failure, while they were before the Court of Appeals, to provide the notice required by Rule 44, Federal Rules of Appellate Procedure. Because Petitioners did not challenge the constitutionality of § 2103 of the Commuting Act before the Court of Appeals, they were not obligated by Rule 44 to provide such a notice.

As implicitly acknowledged by Respondents, however, Petitioners have timely complied with Supreme Court Rule 29.4(b) by notifying the Solicitor General of the United States of their intention to challenge, in this Court, the constitutionality of § 2103 of the Commuting Act. Consequently, this matter is "ripe for certiorari".

PETITIONERS HAVE MOUNTED A SUBSTANTIAL CHALLENGE TO THE CONSTITUTIONALITY OF § 2103 OF THE COMMUTING ACT

Respondents, at pp. 12-13 of their Brief in Opposition, have argued that they would have prevailed in the District Court and the Court of Appeals even if § 2103 had been absent from the Commuting Act. That argument is specious because, as noted by the plurality opinion in *Eastern Enterprises v. Apfel, supra,* "retroactivity is generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been recognized throughout history . . . " 118 S. Ct. at 2151. (Citations omitted)

Next, at pp. 13 through 15 of their Brief in Opposition, Respondents have asserted that "Congress has the constitutional authority to enact retrospective legislation" and such legislation is immune from Due Process Clause attack if it "is itself justified by a rational legislative purpose." However, the stature of the decisions cited by Respondents for the foregoing propositions has been undermined, if not destroyed, by *Eastern Enterprises v. Apfel, supra,* in which this Court declared unconstitutional the retroactive liability provision of the Coal Act.

At pp. 15-16 of their Brief in Opposition, Respondents have argued that § 2103 of the Commuting Act "does not effect a taking" of Petitioners' property for purposes of the Fifth Amendment to the Constitution. On the contrary, § 2103 of the Commuting Act took from Petitioners their legitimate expectations, founded upon this Court's decision in *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 42 (1944), that they would be protected by the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, notwithstanding the contrary terms of a collective bargaining agreement. Certainly, the Fifth Amendment's concept of "property" extends to the right of employees to be lawfully compensated for services rendered to their employer several years prior to the enactment of legislation.

Finally, at pp. 16-17 of their Brief in Opposition, Respondents have contended that this Court's decision in *Eastern Enterprises v. Apfel, supra,* does not alter prior law concerning the constitutionality of retroactive federal legislation. Petitioners contend to the contrary. Ultimately, only this Court can resolve this dispute.

In summary, this Court should seize its sole opportunity to consider the constitutionality of § 2103 of the Commuting Act by granting the Petition for Writ of Certiorari.

Respectfully submitted,

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